A

Re Lim Sue Beng; ex parte RHB Bank Bhd & Ors

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HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO 29–750 OF 2011
AZIZAH NAWAWI J
12 MAY 2016

C

Bankruptcy — Practice and procedure — Power to change carriage of proceedings — Removal of judgment creditor — Whether s 95 of the Bankruptcy Act 1967 applicable — Whether application bona fide — Amendments — Judgment creditor applied for amendment of bankruptcy notice and creditor's petition — Whether application for amendments should be allowed — Bankruptcy Act 1967 s 95 — Rules of Court 2012 O 15 r 6

D

This was an application by the judgment creditors ('JC') for an order that leave be granted to one of the judgment creditors, RHB Bank Bhd ('RHB') to cease to be a party to the proceedings herein and further leave be granted to amend the bankruptcy notice ('BN') dated 24 February 2011 and the creditor's petition ('CP') dated 25 November 2011. This application was filed based on a letter dated 15 December 2015 ('the said letter') by RHB informing the JC that the judgment debt owing by the judgment debtor ('JD') to RHB had been satisfied. The JD submitted that since he had fully paid the settlement sum to RHB, RHB must abide by its agreement to withdraw the bankruptcy proceedings. The JD further argued that there was no provision under the Bankruptcy Act 1967 ('the BA') which allows a JC to withdraw, and under s 95 of the BA, the court may only allow substitution of petitioner and change the carriage of proceedings where the petitioner does not proceed with due diligence. The JD also submitted that the present application was not bona fide as RHB had agreed to withdraw the bankruptcy proceedings. On the other hand, the JC contended that Rules of Court 2012 ('the ROC') was applicable where the provisions on amendment and parties were silent in the BA and Bankruptcy Rules 1969.

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Held, allowing the JC's application with costs:

(1) Since the JD did not file any affidavit in opposition, the said letter did not indicate any withdrawal of the whole bankruptcy proceedings, but only for the withdrawal of RHB Bank as a party. Further, the JC's averment in the affidavit that the application did not prejudice the JD must be taken to be admitted by him. Thus, the JD could not simply raise any issue from the Bar without any affirmed evidence (see para 8).

I

(2) In cases involving substitution and change of carriage of petition, they are only relevant where the JC does not proceed with the petition with due diligence or has no intention to prosecute the petition, and other JC wants to continue with the proceedings. On the facts, there was no issue of the intention of the other seven JCs wanting to continue with the petition. Therefore, there was no statutory limitation in the BA with regards to an application by a JC to withdraw from the bankruptcy proceedings (see para 11).

(3) The present application was made bona fide as one of the creditors of the judgment dated 29 October 2010, RHB wanted to withdraw itself from these proceedings as it had settled its portion of the judgment sum with the JD. Therefore, the JC's rights were not prejudiced by the acceptance of payment made by the JD to RHB, as it did not result in the BN and CP to become defective or irregular. Further, the debt owing under the judgment was not reduced to below the statutory amount of RM30,000 (see para 15).

(4) Since RHB no longer wanted to be involved in the proceedings, the application pursuant to O 15 r 6 of the ROC should be allowed. This necessitated the consequential amendments to the sum owing and therefore the amendments to the BN and the CP should also be allowed accordingly (see para 17).

[Bahasa Malaysia summary

Ini adalah permohonan oleh pemiutang penghakiman ('PP') untuk perintah agar kebenaran diberikan kepada salah satu daripada pemiutang penghakiman, RHB Bank Bhd ('RHB') untuk berhenti menjadi pihak kepada prosiding itu dan selanjutnya diberikan kebenaran untuk meminda notis kebankrapan ('NK') bertarikh 24 Februari 2011 dan petisyen pemiutang ('PM') bertarikh 25 November 2011. Permohonan ini telah difailkan berdasarkan surat bertarikh 15 Disember 2015 ('surat tersebut') oleh RHB memberitahu PP bahawa hutang penghakiman yang perlu dibayar oleh penghutang penghakiman ('PH') kepada RHB telah diselesaikan. PH berhujah bahawa oleh kerana dia telah membayar sepenuhnya jumlah penyelesaian kepada RHB, RHB perlu mematuhi persetujuannya untuk menarik balik prosiding kebankrapan itu. PH selanjutnya berhujah bahawa tiada peruntukan di bawah Akta Kebankrapan 1967 ('Akta tersebut') yang membenarkan PM untuk menarik diri, dan di bawah s 95 Akta tersebut, mahkamah hanya boleh membenarkan gantian pempetisyen dan menukar pelaksanaan prosiding di mana pempetisyen tidak meneruskan dengan usaha yang wajar. PH juga berhujah bahawa permohonan ini tidak suci hati kerana RHB telah bersetuju untuk menarik balik prosiding kebankrapan itu. Sebaliknya, PM berhujah bahawa Kaedah-Kaedah Mahkamah 2012 ('KM') boleh terpakai di mana tiada peruntukan berhubung pindaan dan pihak-pihak dalam Akta tersebut dan Kaedah-Kaedah Kebankrapan 1969.

Diputuskan, membenarkan permohonan PM dengan kos:

(1) Oleh kerana PH tidak memfailkan apa-apa afidavit bantahan, surat tersebut tidak menunjukkan apa-apa penarikan balik keseluruhan prosiding kebankrapan, tetapi hanya untuk penarikan diri RHB Bank sebagai satu pihak. Selanjutnya, penegasan PM dalam afidavit bahawa permohonan itu tidak memprejudiskan PH harus diambil kira sebagai telah diterima olehnya. Oleh itu, PH tidak boleh dengan mudah menimbulkan apa-apa isu daripada Badan Peguam tanpa apa-apa keterangan yang disahkan (lihat perenggan 8).

(2) Dalam kes yang melibatkan penggantian dan penukaran pelaksanaan petisyen, ia hanya relevan di mana PM tidak memulakan petisyen dengan usaha yang wajar atau tiada niat untuk mendakwa petisyen itu, dan PM lain ingin meneruskan dengan prosiding itu. Berdasarkan fakta, tiada isu berhubung niat tujuh PM yang lain menginginkan untuk meneruskan petisyen itu. Oleh itu, tiada had statutori dalam Akta tersebut berkenaan permohonan oleh PM untuk menarik diri daripada prosiding kebankrapan (lihat perenggan 11).

(3) Permohonan ini telah dibuat secara suci hati kerana salah seorang daripada pemiutang penghakiman bertarikh 29 Oktober 2010, RHB ingin menarik dirinya daripada prosiding tersebut kerana ia telah menyelesaikan bahagian jumlah bahagiannya dengan PH. Oleh itu, hak PM tidak diprejudiskan oleh penerimaan bayaran yang dibuat oleh PH kepada RHB, kerana ia tidak menyebabkan NK dan PM menjadi cacat atau luar aturan Selanjutnya, hutang yang perlu dibayar di bawah penghakiman itu tidak dikurangkan di bawah jumlah statutori RM30,000 (lihat perenggan 15).

(4) Oleh kerana RHB tidak lagi ingin terlibat dalam prosiding tersebut, permohonan menurut A 15 k 6 KM hendaklah dibenarkan. Ini memerlukan pindaan tambahan kepada jumlah terhutang dan oleh itu pindaan kepada NK dan PM juga patut dibenarkan sewajarnya (lihat perenggan 17).]

Notes

For cases on practice and procedure in general, see 1(3) *Mallal's Digest* (5th Ed, 2015) paras 3760–3826.

Cases referred to

Chua Liong Hai & Ors v Lian Soon Industries Sdn Bhd [2004] 8 CLJ 117, HC (refd)

Kasiah bt Kasbah, ex p Sime Bank Bhd, Re [2003] MLJU 34; [2003] 5 CLJ 468, HC (refd)

Moscow Narodny Bank Ltd v Ngan Ching Wen [2005] 3 MLJ 693; [2004] 2 CLJ 241, FC (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)
Soveriegn General Insurance v Koh Tian Bee [1988] 1 MLJ 304; [1988] 1 CLJ 155, SC (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 93(3), 95
Bankruptcy Rules 1969 r 276
Rules of Court 2012 O 15 r 6, O 20 r 8
Rules of the High Court 1980 O 20 r 5(1)

Lua Ai Siew (Ely Azura with him) (Soo Thien Ming & Nashrah) for the judgment creditor.
Malik Imtiaz (Woon & Co) for the judgment debtor.

Azizah Nawawi J:

APPLICATION

[1] Enclosure 46 is the judgment creditors ('JC') application for an order, inter alia, that leave be granted to one of the judgment creditors, RHB Bank Bhd to cease to be a party to the proceedings herein and that further leave be granted to amend the bankruptcy notice ('BN') dated 24 February 2011 and the creditor's petition ('CP') dated 25 November 2011 accordingly.

[2] The judgment debtor ('JD') did not file any affidavit in reply. Pursuant to the case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, the JC's narration of facts are deemed to be admitted by the JD.

THE SALIENT FACTS

[3] Both the BN and the CP were issued pursuant to the judgment dated 29 October 2010 in Suit MTKL D5–22–1648 of 2005. The judgment is based on a syndicated loan from eight lenders including RHB Bank Bhd.

[4] In a letter dated 15 December 2015, RHB Bank wrote to the solicitors for the JC to inform the following facts:

> Please be informed that the judgment debt owing by Lim Sue Beng and Gula Perak Sdn Bhd to RHB Bank Bhd has been satisfied.
>
> We will therefore not continue as a party in the above matters.
>
> Please be instructed to withdraw RHB Bank Bhd as a party in the bankruptcy petition against Lim Sue Beng with liberty to file afresh and with no order as to cost.

[5] Based on the above letter, this application was filed.

FINDINGS OF THE COURT

[6] The JD contends that it is a term of the settlement with RHB Bank that the bankruptcy proceedings would be withdrawn against him. The JD submits that since the JD had fully paid the settlement sum to RHB Bank, RHB Bank must abide by its agreement to withdraw the bankruptcy proceedings.

[7] Added to that, since the JD has altered his position by raising and paying the sum of RM3,851,200 to RHB Bank, then RHB Bank should be estopped from applying to amend the BN. The JD also claimed to be prejudiced by this application as the JD will not have the right to receive a fresh BN from the other judgment creditors to allow him the right to pay within the time allowed in law.

[8] However, I am of the considered opinion that since the JD did not file any affidavit in opposition, the letter dated 15 December 2015 does not indicate any withdrawal of the whole bankruptcy proceedings, but only for the withdrawal of RHB Bank as a party. Further, the JC averment in the affidavit (para 9 of encl 45) that the application does not prejudice the JD must be taken to be admitted by him. Thus, the JD cannot simply raise any issue from the Bar without any affirmed evidence. This is supported by the case of *Chua Liong Hai & Ors v Lian Soon Industries Sdn Bhd* [2004] 8 CLJ 117 which held that:

> Therefore, the defendants; solicitor's submission on the issue of irregularity is inadmissible as the same is not based on evidence from the affidavit in support filed by the defendants. It is also trite law that submission on evidence from a solicitor (evidence from the Bar) is inadmissible in a court of law, without the support of any affidavit evidence in an application based on affidavit evidence. It is also trite law that parties are bound by affidavit evidence made by it. The defendants' solicitors action in raising issues not deposed in affidavit prejudiced the plaintiff.

[9] The JD further submits that this application is misconceived as the BN and CP is based on a single judgment for all eight creditors. Thus a single BN was issued and a single CP was mounted. In such a situation, the JD submits that the BN must be withdrawn and fresh proceedings to commence. This is because there is no such provision under Bankruptcy Act 1967 ('the BA 1967') which allows a JC to withdraw, and under s 95 of the BA 1967, the court may only allow substitution of petitioner and change the carriage of proceedings where the petitioner does not proceed with due diligence. Section 95 reads:

> 95 Power to change carriage of proceedings
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> Where the petitioner does not proceed with due diligence on his petition, the court may substitute as petitioner any other creditor to whom the debtor is indebted in the amount required by this Act in the case of a petitioning creditor, or may give the

carriage of the proceedings to the Director General of Insolvency, and thereafter the proceedings shall, unless the court otherwise orders, be continued as though no change had been made in the conduct of the proceedings.

[10] The JD further submits that the English position, as reflected in paras 173 and 174 of *Halsbury Laws of England*, which allows wider ground for substitution of petitioner and change of carriage of petition, is not found in our provisions.

[11] However, I am of the considered opinion that since this application is not for the substitution of a JC or a change of carriage of petition, the issue of s 95 of the BA 1967 and paras 173 and 174 of *Halsbury Laws of England*, are not relevant. In cases involving substitution and change of carriage of petition, they are only relevant where the JC does not proceed with the petition with due diligence or has no intention to prosecute the petition, and other JC wants to continue with the proceedings. In this case, there is no issue of the intention of the other seven JC wanting to continue with the petition. Therefore, there is no statutory limitation in the BA 1967 with regards to an application by a JC to withdraw from the bankruptcy proceedings.

[12] Added to that, I agree with learned counsel for the JC that s 93(3) of the BA 1967, read with r 276 of the Bankruptcy Rules 1969 meant that the Rules of Court 2012 ('the ROC 2012') is applicable where the provisions on amendment and parties is silent in the BA 1967 and Rules 1969. The relevant provisions read:

(i) Section 93(3) of the BA 1967:

> 93 Discretionary powers of the Court
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> (1) ...
>
> (2) ...
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> (3) The court may at any time amend any written process or proceeding upon such terms, if any, as it thinks fit to impose ...

(ii) Rule 276 of the Bankruptcy Rules 1969:

> In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of the High Court shall apply, mutatis mutandis.

[13] In the absence of any rules, O 15 r 6 of the ROC 2012 with regards to parties and O 20 r 8 of the ROC 2012 with regards to amendment are therefore applicable.

[14] In *Re Kasiah bt Kasbah, ex p Sime Bank Bhd* [2003] MLJU 34; [2003] 5 CLJ 468, the court held that in an application to amend the bankruptcy

notice and the creditors petition, the court will apply the principles in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 in respect of amendment of pleadings under O 20 r 5(1) Rules of the High Court 1980 ('the RHC 1980'), that is:

> The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (a) whether the application was bona fide (b) whether the prejudice caused to the other side can be compensated by costs and (c) whether the amendments would not in effect turn the bankruptcy proceeding from one character into an inconsistent proceeding of another and inconsistent character.

[15] On the issue of bona fide, the JD submits that this application is not bona fide as RHB Bank had agreed to withdraw the bankruptcy proceedings. As I have said earlier, there is no affidavit to support this contention, whilst the letter from RHB Bank clearly shows that they wanted to cease from being a party from these proceedings, which resulted in the filing of this application.

[16] Added to that, I agree with the contention of the JC that this application is made bona fide as one of the creditors of the judgment dated 29 October 2010, RHB Bank wanted to withdraw itself from these proceedings as it has settled its portion of the judgment sum with the JD. From the judgment sum of RM28,651,503 (as at 7 November 2012) payable to the JCs, RHB Bank portion is RM9,268,336.25, leaving a balance sum owing at RM19,058,321.15 as at 24 February 2011. Therefore, the JCs rights are not prejudiced by the acceptance of payment made by the JD to RHB Bank, as it does not result in the BN and CP to become defective or irregular. The debt owing under the judgment is not reduced to below the statutory amount of RM30,000. In *Soveriegn General Insurance v Koh Tian Bee* [1988] 1 MLJ 304; [1988] 1 CLJ 155, the Supreme Court held that:

> Where a bankruptcy notice has been served and not complied with, in respect of a judgment debt which has subsequently been reduced on appeal, that reduction does not retrospectively per se cause the notice to become defective or irregular.

[17] This position is reaffirmed by the Federal Court in *Moscow Narodny Bank Ltd v Ngan Ching Wen* [2005] 3 MLJ 693; [2004] 2 CLJ 241 where the court held that the jurisdiction of the bankruptcy court is not ousted when the balance debt is still above the statutory minimum sum. At p 260, Hamid Mohamad FCJ held that:

> Malaysian courts have, on many occasions, followed Re Patel and took similar view, ie where after the filing of the creditor's petition the amount owing by the debtor is reduced, the petition is not bad as long as the amount remaining owing at the date of hearing of the petition is more than the statutory limit ...

[18] Therefore, I am of the considered opinion that since RHB bank no longer wants to be involved in these proceedings, the application pursuant to O 15 r 6 of the ROC 2012 should be allowed. This necessitates the consequential amendments to the sum owing and therefore the amendments to the BN and the CP should also be allowed accordingly.

[19] Premised on the reasons enumerated above, the application is allowed with cost.

Application allowed with cost.

Reported by Dzulqarnain Ab Fatar